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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 14

LLOYD C. DUNCAN,
Petitioner,

vs.

DUKE PAOA KAHANAMOKU, Sheriff of the City and County of Honolulu,
Respondent.

BRIEF FOR LLOYD C. DUNCAN, PETITIONER.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals[1] for the Ninth Circuit is reported in 146 Fed. (2d) 576. The opinion of the United States District Court for Hawaii is not reported but is found in the record at pages 389 to 402.

[1]The Circuit Court of Appeals decided this case together with the companion case of *White v. Steer* (No. 15, October 1945 Term) in one opinion embracing both cases; references to *White v. Steer* in this brief will be indicated thus: (White R.).

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 1, 1944. The petition for certiorari was filed in this Court on January 13, 1945 and certiorari was granted on February 12, 1945.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the act of February 13, 1925. (28 U.S.C. 347.)

STATEMENT OF THE CASE.

This case involves the validity of the trial of a civilian residing in Hawaii who was charged, tried, convicted and imprisoned for a term of six months by a provost court for the alleged offense of assault and battery on two fully armed marine sentries stationed at Pearl Harbor, a naval reservation in Hawaii.

On the evening of February 24, 1944, petitioner, a shipfitter employed at Pearl Harbor, entered the main gate to report to his job accompanied by a friend, a merchant seaman. While waiting for the latter's transportation to his ship, petitioner had words with two of the marine sentries stationed at the gate, a quarrel ensued and the petitioner was arrested by the marines, taken into custody and released the following day. (R. 519.)

On March 2, 1944, he was brought before a provost court at Pearl Harbor presided over by a naval officer and there tried and convicted of the offense of assault and battery on the two sentries and sentenced to six

months' imprisonment in the city and county jail. (R. 11.)

At the time of petitioner's provost court trial and for months prior thereto the courts of Hawaii ordained by law were in the full exercise of their judicial powers, trying civil and criminal cases of every nature.

The District Court on April 20, 1944, held the provost court trial invalid and released the prisoner on a writ of habeas corpus. (R. 403.) The Circuit Court of Appeals reversed the judgment of the District Court and ordered petitioner remanded to custody.

The institution of martial law.

In order to present the case in its proper setting we will summarize some of the main facts relating to the establishment of martial law in Hawaii.

On December 7, 1941, after the attack on Pearl Harbor the governor invoked the Hawaii Defense Act.[2] Later on the same day he suspended the privilege of the writ of habeas corpus and proclaimed martial law throughout the territory pursuant to Section 67 of the Hawaiian Organic Act.[3]

The governor advised the President that he had suspended the privilege of the writ of habeas corpus and proclaimed martial law in Hawaii and his action was approved by the President by cable. (R. 61-2.)

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[2]Spec. S. L. Haw. 1941, Act 24. The Hawaii Defense Act regulations promulgated pursuant to this Act are in evidence as Exhibit M which has not been printed; the proclamation of the governor invoking the Defense Act is reproduced in the appendix.

[3]31 Stat. (1900) 153; 48 U.S.C. Sec. 532.

The governor in his proclamation not only suspended the privilege of the writ of habeas corpus and proclaimed martial law as he had advised President Roosevelt but went further:

> "And I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor;
>
> "And I do further authorize and request the said Commanding General * * * during the present emergency and until the danger of invasion is removed to exercise the powers normally exercised by judicial officers and employees of this Territory * * *." (R. 57.)

The text of the governor's proclamation was never approved by President Roosevelt and it is doubtful if he ever saw it. (White, R. 58.) Immediately following the governor's proclamation, Lt. General Walter C. Short issued a proclamation:

> "I announce to the people of Hawaii that in compliance with the above request of the Governor of Hawaii I have this day assumed the position of military governor of Hawaii and have taken charge of the government of the territory * * *.
>
> "I shall therefore shortly publish ordinances governing the conduct of the people of the territory with respect to the showing of light, circulation, meeting, censorship, possession of arms, ammunition and explosives, the sale of intoxicating liquors and other subjects.

"In order to assist in repelling the threatened invasion of our island home good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function." (R. 59, 60.)

General Short's proclamation indicates that it was his intention to administer martial law in the territory along orthodox lines, i.e., that the "ordinances" which he forecast promulgating would have some basis in military necessity to resist the "threatened invasion".

Lt. Colonel Thomas H. Green who became the executive officer under the self-styled "military governor" did not share this view. He set up a system for the administration of military justice to punish civilians as the provost courts thought fit without regard to the limitations of statutes of the territory or of the United States or any provision of the Federal Constitution. (General Orders No. 4.)[4]

On December 8, 1941, the courts of Hawaii ordained by law were suppressed by order of General Short and army personnel moved in, took over the courtrooms, clerks' offices, clerks and facilities of the police court of Honolulu and certain other courts of limited jurisdiction throughout the territory for the trial of cases before army officers sitting as provost court judges.

[4]General Orders 1 to 181 covering the period December 7, 1941 to January 30, 1943 are in evidence as Exhibit V which has not been printed. G. O. No. 4 is reproduced in the appendix.

(R. 594-9.) Evidently concluding that certain business had to be done by the courts established by law, the commanding general on December 16, 1941, issued General Order 29 (R. 1194) which relaxed the original order forbidding the courts of the territory to operate and permitted them to function in certain uncontested civil matters. However, trial by jury and the subpoenaing of witnesses was forbidden under pain of conviction and imprisonment by military tribunals. A further modification was made on January 27, 1942 by General Order No. 57 (R. 1194) which authorized the courts created by law to entertain certain civil cases "acting" as agents of the "military governor". The prohibition against trial by jury, the summoning of grand juries and the issuance of the writs of habeas corpus remained.

The trial of criminal cases of every description before military tribunals continued unabated from December 8, 1941, until after the appointment of United States District Judge Ingram M. Stainback as governor of Hawaii on July 23, 1942. The newly appointed governor convinced that no necessity warranted the trial of civilians before military tribunals and that the erection of a military government over Hawaii without authority of Congress or the President was not only unlawful but unnecessary, proceeded to Washington to accomplish the restoration of civil government in Hawaii. There he negotiated with the War Department, Jusfice Department and the Department of the Interior. (R. 880-4.) The negotiations resulted in a compromise avoiding taking the

issue to the President. The compromise was contained in the proclamation of the governor, February 8, 1943, which substantially restored civil government. (R. 14.) General Emmons at the same time (without any statutory authority) issued a similar proclamation as "military governor of Hawaii" by which he "relinquished" to the governor, other officers of the territory and the federal court "full jurisdiction" over certain enumerated subject matters. (R. 77.) Martial law was formally terminated by President Roosevelt on October 24, 1944, by proclamation No. 2627. (9 F. R. 12831.)

The military situation.

There is no dispute in the record that the threat of invasion which existed in the early days following Pearl Harbor had disappeared over a year prior to petitioner's trial in the provost court. As a matter of history the Japanese aggression had been stopped at the Battle of Midway in June of 1942. As reported by General Marshall the Battle of Midway marked the highpoint in enemy aggression and threats in the Pacific and from that time on the enemy was turned back with punishing losses.[5] Major General Hale, in command of the Seventh Air Force based in Hawaii, writing in the Army and Navy Register for March, 1944, gave his professional opinion that the threat of invasion of Hawaii was lifted after the Battle of Midway. (R. 670.) At the time of petitioner's trial

[5]Biennial Report of the Chief of Staff, U. S. Army (1943) House Document No. 288, 78th Cong. 1st Sess. 14, 30; see also Report on the Navy and the War, 78th Cong. (1943) 1st Sess., Senate Document No. 107, p. 15.

(March 2, 1944) the battle line had been thrust thousands of miles west of Hawaii. Occupied Kiska and Attu had been recovered; the Solomon Islands campaign had been completed; the Gilbert Islands were occupied by our forces. (R. 630); the Marshall Islands, 2400 miles west of Hawaii were under command of Admiral Nimitz (R. 748.) and our forces were attacking Palau, 3600 miles southwest of Hawaii and the Mariannas as a prelude of the invasion of those groups which followed shortly. (R. 611-614.)

Admiral Chester W. Nimitz, commander in chief, United States Pacific Fleet and Pacific Ocean Areas (now Fleet Admiral), made it quite clear that an invasion of Hawaii in any accepted sense was out of the question. He testified:

> "Invasion by seaborne troops in sufficient number to seize a bridgehead, no. I consider it neither imminent nor probable."

and then Admiral Nimitz added:

> "But invasion by stealth, commando raids, espionage parties, I consider it not only probable but imminent."

and that it would be possible for the enemy to send planes over Hawaii "if the Japanese wish to take the risk." (R. 1078.)

General Richardson agreed with Admiral Nimitz as to the impossibility of invasion. His opinion was that the enemy was totally incapable of such a threat, "the time for that is past", but that it was possible that Hawaiian waters could be visited by enemy sub-

marines or that the enemy might attempt an air raid on Hawaii. (R. 1030.)

The conduct of the civil population.

Whatever conclusion is reached in regard to state of readiness of the military establishments in Hawaii on December 7, the civil community was fully prepared. Long prior to December 7, the civil community convinced that war was inevitable had devised elaborate plans consisting of volunteer policemen, organized and trained medical groups as well as hospital units. (R. 664-665.) These were completed a year prior to the outbreak of war. The legislature was called into special session in 1941 and enacted the Hawaii Defense Act depositing extraordinary power in the governor of Hawaii to meet any emergency. General Short had urged the enactment of this law before the Senate of Hawaii to avoid the confusion of martial law.[6]

On December 7, the civil emergency agencies prepared as they were sprang to action in a single effort. The Office of Civilian Defense enrolled 27,000 volunteer workers. (R. 665.) The entire population was fingerprinted and given identification cards under the Defense Act. Air raid stations, first aid stations and evacuation centers were staffed and ready. Businessmen formed volunteer groups for military training on each island. (R. 666.)

Since December 7, there has been no civil strife, commotion or disorder. Governor Stainback testified

[6]Minutes, Senate Committee as a Whole, September 17, 1941.

that the conduct of the civil community was "admirable from every standpoint" (R. 821, 583, 596), and the high naval and military command agreed. (R. 664, 746, 747, 769, 770, 1140, 1141, 1143.)

Hawaii is one American community where racial and religious tolerance is a social norm.[1] The population of Hawaii is cosmopolitan, one-third consisting of persons of Japanese descent. Upon the outbreak of war the Hawaii Territorial Guard was called into service by the governor. In their ranks were Americans of Japanese descent. The Guard discharged the responsibilities of guarding important docks, public utilities and other vital installations during the first two months of war but were then inactivated by order of the Commanding General. (R. 1109.) One group from the University organized itself as Volunteers, tendered their services to General Emmons and were detailed to the 34th Combat Engineers. After eleven months' service they were permitted to enlist in the Army. (R. 1136.) When it became known that although excluded from the draft, volunteers would be taken, 10,000 volunteered to form the 442d Combat Team, which later invaded Sicily and helped take the beaches at Salerno. (R. 658, 661.)

The record of the 100th Battalion (a former Hawaii National Guard unit, consisting of Americans of Japa-

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[1] And, *The Japanese in Hawaii Under War Conditions* (1943), American Council Institute of Pacific Relations; see also, *A Report of an Investigation and Study of the Subject of Statehood and Other Subjects Relating to the Welfare of The Territory of Hawaii* (1938), Senate Document No. 151, 75th Congress, 3rd Session.

nese ancestry) led the War Department to reverse its prior ruling excluding Americans of Japanese ancestry from the draft. (R. 656.)

The rumors of subversive or fifth column activities among the Japanese in Hawaii have no basis in fact. This is made clear by the evidence of Colonel Kendall J. Fielder, in charge of military intelligence of the United States Army, ever since the outbreak of the war. Colonel Fielder states:

> "Having been in charge of military intelligence activities since June, 1941, I am in a position to know what has happened. There have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941". (R.687.)

The courts.

The civil courts of Hawaii were opened and doing business on the Monday following the attack on Pearl Harbor but were closed on that day by order of the Commanding General. It is undisputed in the record that at all times the civil courts have been ready, willing and fully able to discharge their duties prescribed by law. Since December 7, 1941, the district court of Honolulu (a court of limited criminal and civil jurisdiction) handled 69,582 criminal cases and 2641 civil cases. In 1942 this Court tried 969 civil cases, 15,011 criminal cases. In 1943 it handled 1240 civil cases and 43,775 criminal cases and in the first three months of 1944, 11,796 cases. (R. 592, 593.) The business of the Supreme Court of Hawaii and the Circuit Courts,

(courts of record) for the years 1939 to 1943 is summarized in Exhibit "H". (R. 682.)

The records of the Court which tried this case show that it has never been closed but has been sitting continuously handling a large volume of business including the usual run of civil and criminal cases. The Courts of Hawaii have been functioning at all times since the war, limited only by restrictions placed upon them by military orders.

Judge Albert M. Cristy, the senior judge of the Circuit Court, a graduate of Brown University and the Harvard Law School, having held office since 1926, testified that immediately after the attack the judges desiring to assist the military authorities made suggestions as to the conduct of business, continuance and settings but without success. (R. 601.) Judge Cristy testified that the business of the Court in 1943 was the same as before the war and that there was no reason whatsoever why any criminal case could not be tried in the Courts of the territory (R. 602), that there was no disorder in the community and that the only obstacle to the Courts exercising full jurisdiction was the command of military orders and that no reason or necessity existed for curtailing the activities of the Courts. (R. 604.) Judge Steiner, whose courtroom was taken over by the provost courts on the outbreak of war and retained by the Army until September, 1942, testified from his daily observation of the provost courts in action that he saw no case that could not have been handled by his Court had the military authorities permitted it. (R. 596.)

Transportation to and from Hawaii.

Since the outbreak of war Hawaii (as might be expected) has been closely linked with the mainland and the South Pacific by surface and air transportation. In 1942, inbound commercial tonnage by surface was 993,797 tons and in 1943, 1,010,437 tons. Commercial shipments out of the territory during the same two years were 1,310,469 tons and 1,542,769 tons. Civilian passengers entering the territory by surface vessels from January 1, 1942, to March 31, 1944, was 23,492; outbound civilian passengers totaled 31,626. Hundreds of merchant ships had cleared the port of Honolulu since December 7, 1941. None had been sunk in the years 1942, 1943 and 1944, but a few attacked. (R. 698.) The rate of marine insurance on merchandise shipped between the Pacific coast and Hawaii was $5.00 per $100.00 of insurance on December 10, 1941, but by December 9, 1943, had dropped to 50¢ per $100 of insurance. (R. 692.)

The years of 1942, 1943 and 1944 witnessed a most comprehensive coverage of the Islands of the Pacific by cargo and passenger aircraft. Thousands of routine flights were completed between Honolulu and the mainland ("a considerable number of flights daily"), the Islands of the South Pacific, New Zealand and Australia. The network of airlines also included Midway, Solomon Islands, Gilbert Islands, Society Islands and New Guinea. (R. 698-9.)

The record discloses no necessity for provost courts.

Governor Stainback, Judge Cristy and Judge Steiner all testified that there was no need for the trial

of civilians in the provost courts. (R. 820,826-8, 602-5, 596.) Admiral Nimitz, the Commander in Chief, gave no testimony on the subject. General Richardson gave several reasons as to why he thought the provost courts were desirable. He testified "in order to enforce those regulations I must have at my disposal some sort of tribunal to that effect". (R. 1027.) He considered eliminating them, decided against that course because the violations of military orders were not offenses against territorial or federal law. The trial of civilians in a civil court he thought would be objectionable because of "its concomitant delay" and the military authorities "cannot brook a delay". (R. 1028.)

The enforcement of his orders in a federal court under executive order 9066 he found equally objectionable because this would subject him "to all sorts of influences political and otherwise as happened in the cases on the east coast both in Philadelphia and Boston" and that "it is inconceivable that the military commander should be subjected for the enforcement of his orders to the control of other agents". (R. 1029.)

General Richardson admitted that he was unfamiliar with the courts of Hawaii and had no knowledge of any delays (R. 1051), he saw no distinction between his mission as a soldier in Hawaii and his political mission (R. 1052, 1068), but he conceded that the need for the existence of a military tribunal to enforce the Commanding General's orders in Hawaii was no greater than the need for such a tribunal in California, Maryland or Pennsylvania. (R. 1056-7.)

ERRORS RELIED ON.

The Circuit Court of Appeals erred:

(1) In ruling that the provost court had jurisdiction to try, sentence and imprison petitioner, a civilian not connected with the armed forces, for the alleged offense of assault and battery upon naval personnel contrary to General Orders No. 2, 8.01.

(2) In failing to rule that the privilege of the writ of habeas corpus was not suspended on April 20, 1944, as to this case.

SUMMARY OF ARGUMENT.

(1) The provost court is without jurisdiction to try a civilian for an offense against the general law applicable in the territory which is neither an offense against the Articles of War or the law of war so long as the Courts are discharging their statutory powers and no obstacle exists to a lawful prosecution in such courts. The offense for which petitioner was tried was within the class of offenses constitutionally triable only by jury. Therefore his trial in a provost court being contrary to the Fifth and Sixth Amendments was void.

(2) "Martial law" authorized by Section 67 contemplates the exercise of executive power based upon military necessity. The trial Court on the basis of clear and convincing evidence found as a fact that no necessity existed for provost courts on March 2, 1944. The Circuit Court of Appeals without reference to any factual justification held that paragraph 8.01 of Gen-

eral Orders No. 2 was "reasonable" and that since the order was not enforceable in the civil courts concluded that it must be enforceable some place and therefore the trial in the military courts was valid. The fact that the military authorities chose to ignore the ample statutory means of promulgating and enforcing military regulations in the federal courts which the Congress had afforded (56 Stat. (1942) 173; 18, U. S. C. 97-a) is no basis for concluding that the military authorities may promulgate regulations and enforce them in military courts which Congress has not authorized.

(3) The court below held that Section 67 of the Hawaiian Organic Act authorized the governor to turn over all executive, legislative and judicial powers to the commanding general and to erect a "total military government" in Hawaii "under exclusive military rule". This is a manifest distortion of the words of Section 67. The language of the act authorizes no such delegation. If it did the section would be contrary to the Fifth and Sixth Amendments.

(4) The suspension of the privilege of the writ of habeas corpus under the Federal Constitution and under Section 67 of the Hawaiian Organic Act is not, and historically never has been, a general suspension applicable to all cases. The suspension of the privilege of the writ is limited to persons hostile to the Government. Hence irrespective of the termination of martial law petitioner was entitled to his release on habeas corpus.

ARGUMENT.

I.

THE JURISDICTION OF MILITARY TRIBUNALS DOES NOT EXTEND TO CIVILIANS EXCEPT FOR OFFENSES UNDER THE ARTICLES OF WAR OR AGAINST THE LAW OF WAR SO LONG AS CIVIL COURTS ARE ABLE TO EXERCISE THEIR STATUTORY AND CONSTITUTIONAL FUNCTIONS.

From the statement of the case and the evidence in the record it is clear at the time of the trial of petitioner on March 2, 1944, all of the civil courts of Hawaii were fully able to perform their normal duties; that under identical facts and circumstances existing in any of the states a martial law tribunal would have been without jurisdiction either over the person of the petitioner or the subject matter; that if the military tribunal has jurisdiction in this case it must be posited on some disability that attaches to the residents of a territory as distinguished from the residents of a state. In the first part of this brief we will attempt to analyze the basis upon which martial law tribunals in general assert jurisdiction over civilians so as to be able to determine whether there is any basis upon which Hawaii may be accorded discriminatory treatment in this connection under the Federal Constitution.

(1) The exercise of jurisdiction by a martial law tribunal over a civilian can only be justified by urgent necessity.

It must be conceded that the exercise of any power under martial law is based upon necessity. This prin-

ciple is well settled in Anglo-American jurisprudence[1] and has been authoritatively decided by this Court.

Ex Parte Milligan, 4 Wall. 2, 142 (1866);
Mitchell v. Harmony, 13 How. 115, 134 (1851);
Sterling v. Constantin, 287 U. S. 387, 400 et seq. (1932).

The writers on military law are in accord with this view.

2 Winthrop's *Military Law and Precedents* (1896) 1279, 1280.

"Its limitations. The employment of martial law has been likened to the exercise of the right of *self-defense* by an individual. Its occasion and justification thus is necessity. * * *

"It is a further principle that while martial law is not to be inaugurated precipitately or inconsiderately so it is to be *continued* only so long as the public exigency on account of which it was declared shall prevail. It is not, indeed, essential to the discontinuance of such state that the original declaration of the same be formally *revoked*. When the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced."

A terse statement of the matter appears in Wiener, *A Practical Manual of Martial Law* (1940) p. 16:

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[1] Holdsworth, *Martial Law Historically Considered*, 18 L.Q. Rev. (1902) 117;
Pollock, *What is Martial Law?* 18 L. Q. Rev. (1902) 152;
Dicey, *Law of the Constitution* (8th Ed. 1920), 280, 538.

"19. Fundamental Principal of Martial Law. —Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed. That necessity is no formal, artificial, legalistic concept but an actual and factual one; it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity * * *."

In amplification of the general principles Wiener shows in his valuable manual that in domestic disturbances within the United States (barring, perhaps, only the years 1861 to 1865) the employment of federal troops "has never yet included the trial and punishment of civilian offenders by military tribunals".[9] It is also clear that a proclamation of martial law, whether by civilian authority or the military commander, is merely evidence to be considered in determining whether the particular exercise of military power is justified, but that such proclamation is not necessary as a condition precedent, nor is it conclusive, as to the necessity, and it certainly does not make lawful the exercise of powers depending upon martial law not justified in fact by necessity.

The provost court which acted in the case at bar was not constituted by an Act of Congress. Its existence and the limit of its jurisdiction as to persons and offenses must be based solely on the common law of war. It is not contended in this case that the peti-

[9]Wiener, Op. Cit., supra, p. 103.

tioner is a "person subject to military law" as this phrase is used in Article 2 of the Articles of War (10 U.S.C. Sec. 1473), or that the military tribunal that sentenced the petitioner is a "court-martial" as constituted by Article 3 of the Articles of War. (10 U.S.C. 1474 et seq.) Consequently if the marital-law tribunal had jurisdiction, it would first be necessary to show wherein the decision in *Ex Parte Milligan* is inapplicable. Even if it be now assumed (as is not conceded) that the reasoning of the minority in this decision should prevail; that is, that Congress is constitutionally authorized to create military tribunals with authority to try civilians for alleged crimes "against the security and safety of the national forces" should Congress determine as a matter of policy that the same were proper, it is sufficient to point out that in the case at bar Congress has not directed the creation of such military tribunals[10] and furthermore that martial-law tribunals operating in the Territory exercised jurisdiction in matters that are not necessarily related to the "security and safety of the national forces".

Stated another way, there is some evidence in this case which would form the basis of an argument to the Congress that military tribunals should be created in Hawaii by congressional action so that in all matters relating to military operations in this important island base there could be the greatest directness. This is

[10]The argument of the Government that Sec. 67 of the Hawaiian Organic Act supports the creation of such tribunals is answered in the second part of this brief.

precisely what Congress did in the case of certain islands of the Pacific other than Hawaii.[11] It is presumed, however, that if Congress deemed such action necessary or expedient it would adequately safeguard the rights of affected civilians by providing for limited jurisdiction, limited penalties and adequate review, as well as guaranteeing that the fundamentals of fair trial should in no event be withheld; and the congressional determination of the necessity for such trials outside the constitutional guarantees, would be subject to constant judicial scrutiny to ascertain whether the necessity continued which justified the deprivation of a civil trial.

The court below held that because the military orders here challenged were not by their terms enforceable in the civil courts they must be enforceable in military courts.

> "The power to punish infractions of military regulations of this type must of necessity reside somewhere. If it has not by legislation or municipal ordinance been delegated to the ordinary courts or made subject to the authority of the civil police, the power perforce must exist in the military arm of the government acting through the medium of commissions or like tribunals." (R. 1207.)

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[11] Act of March 22, 1943, 57 Stat. 41; 34 U.S.C. Sec. 1201; the previous year on March 21, 1942, Congress enacted the "military area" statute (56 Stat. 173). General Order 7 recites that on October 16, 1942 pursuant to Executive Order 9066 General Emmons had designated Hawaii as a military area (R. 161) but despite this designation military orders were enforced in military courts not in the federal court as Congress had directed.

This is a complete *non sequitur*. The Congress by the Act of March 21, 1942 (56 Stat. 173) clothed the military arm with sweeping powers to promulgate military regulations with the only limitation that they should be enforced in the federal courts. Under this statute the power vested in the military arm of government was so vast that 70,000 American citizens were removed from their homes on the West Coast and confined in relocation centers (*Korematsu v. United States*, 323 U. S. 214) in the interior with the approval of this Court. It is idle to say there was any dearth of power, or that the Congress had not "delegated" enforcement of military regulations "to the ordinary courts". Because a commanding general disdains the use of the statutory framework erected by Congress affords no legal justification for erecting tribunals of his own for the enforcement of his orders.

This Court's recent paraphrasing of the *Milligan Case* in *Ex Parte Quirin*, 317 U. S. 1, could well be applied to the petitioner—"not being a part of or associated with the armed forces of the enemy, (he) was a non-belligerent, not subject to the law of war, save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established".

It is not easy to distill out of the cases and material bearing on the subject a clear statement of the principles that are to be applied in determining when—if ever—military necessity justifies the subjugation of civilians to punitive justice administered by a martial-law tribunal. But the most ardent advocate of the use of military power concedes that such tribunals sit

only because of "an imperious necessity".[12] A consideration of the nature of the operations of such tribunals demonstrates the overwhelming social desirability of limiting their use to situations where resort to constitutional courts is virtually impossible. Such tribunals are frequently presided over by persons who have no knowledge of or association with the judicial tradition as the same is understood by civil courts; their procedure is governed by military custom, plus such rough guides as are included in the general orders of the military commander; they attempt to mete out justice in an atmosphere in which haste seems far more important than exactness. A general description of the differences between the two types of courts as stated by Birkheimer illustrates the point:

> "The former (military tribunals) essay to mete out substantial justice amidst great social disorder; the latter, in times of peace, dispenses an exact justice so nearly as human frailties render possible. The former are often compelled to proceed largely upon appearances; the latter seeks to interpose a protecting wall against the errors which appearances often give rise to by requiring consistent and conclusive proof of every essential element of the crime. The former are characterized by the nervous energy of executive, the latter by the calm deliberation of judicial action. Each is best adapted to the time, place and circumstances which environ and call it into being." (Birkheimer, Op. Cit. p. 424.)

[12] Birkheimer, *Military Government and Martial Law* (1892 Ed.), p. 422.

Likewise in contrasting the procedure before the Courts the same authority points out (p. 423):

> "The one (civil court) is established by law, either statutory or common; its procedure is regulated by known rules; its jurisdiction has defined territorial limits; the causes it takes cognizance of are well known. The other, with rare exceptions, is called into being by a military order; its procedure is regulated by the customs which, though well understood in their general bearing, are of variable application; the causes it is to determine are to a great extent known only to the anomalous condition of martial law. * * *"

This authority also quotes with approval the remark of Lord Loughborough in *Grant v. Gould*, 2 H. Blackstone 69, that:

> "* * * it would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace."

Birkheimer, believing that the greatest freedom of action is imperative for martial-law tribunals, attempts to dispel any fear of abuse on the part of civilians by stating:

> "If they (civilians) will take counsel of the facts of modern history in free governments, rather than of groundless fears, they will realize that military officers assume the responsibilities or martial law but reluctantly, after the civil authorities have signally failed to meet the ends of government, and it becomes necessary to have some powerful and sufficient substitute to main-

tain order in the distracted district." (Birkheimer, Op. Cit., supra, p. 429.)

Further conceding that (p. 431):

> "The rules of procedure and of evidence of martial-law tribunals may seem crude when judged by the common-law standard,"

he again gives comfort to the civilian:—

> "But it must be remembered that these tribunals are convened only when ordinary methods have ceased to be applicable, and therefore that which in the normal condition of society would be irregular becomes regular and highly commendable. * * * Only the gravest occasions will warrant resort to martial-law tribunals. Generally in the enforcement of martial law, the military will content themselves simply with preserving order and defending their dignity and authority from attack, delivering civilians who may be arrested over to civil officers for trial when the Courts are reinstated.[13] Still * * * there may and do arise occasions when such tribunals justly may be invoked to supply the energy and certainty in the administration of penal affairs which have become necessary, and which cannot be furnished by the ordinary judicial system." (Birkheimer, Op. Cit., p. 431.)

The principle inferable from the writings of jurists is that the use of martial-rule tribunals to mete out

[13]General Short, who was relieved on December 17, 1941, by General Emmons, seems to have recognized this in his original proclamation when he announced: "Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function". (R. 60)

punitive justice to civilians requires that degree of necessity or indispensability which may be considered as overwhelming and counter-balancing the consideration of all the hardships and difficulties that are incident to such use—that in the scale of gradations of possible measures justified by necessity, the displacement of the civil courts by the martial-law tribunals represents the final searching out appropriate only in a critical exigency which demonstrably prevents the Courts from functioning. That the Courts are constitutionally empowered to and will review on proper application the question of whether the circumstances justify this ultimate extension of martial-law power is no longer disputable. (*Ex Parte Milligan*, 4 Wall. 2 (1866); *Sterling v. Constantin*, 287 U. S. 378, 400, 401 (1932); *Hirabayashi v. United States*, 320 U. S. 91 (1943).).

(2) The evidence in the record and findings of the District Court show that the circumstances which would justify the exercise of jurisdiction by a martial law tribunal over a civilian were not present in Hawaii in March, 1943.

Unlike other cases that have come before this Court in the past involving the exercise of war powers or the jurisdiction of military tribunals over civilians, this case is not presented with a record barren of evidence upon which a judicial determination can be made. This Court is not obliged to pass upon the case in the absence of a factual record or to speculate as to the facts or to reach conclusions on the facts unaided by the findings of a trial court.

In the opinion of the trial Court, after summarizing the historic facts relating to the declaration of

martial law and the substantial restoration of civil authority which became effective on March 10, 1943, there is a finding of fact as follows:

> "I find from the evidence that at all times during the year 1943 and continuing to this day, conditions were such throughout all the principal islands of the Territory of Hawaii that the regularly constituted civil government was either in efficient operation or fully capable of such operation in all its branches and ordinary departments and was sufficiently equipped, capable and willing to perform all functions for which it was created." (R. p. 401.)

Therefore the Court concluded as a matter of law that the provost court had no authority in law to try, find guilty and sentence the civilian petitioner to imprisonment in the county jail of the City and County of Honolulu. The validity of the conclusion of law cannot be denied assuming the correctness of the finding of fact, and on appeal, the finding of fact of the trial Court will not be disturbed so long as there is substantial evidence to sustain the fact and the findings are not clearly erroneous.

That it might be more expedient for the Commanding General to try offenders of his orders before his own tribunals furnishes no constitutional basis for the jurisdiction of such tribunals so long as civil courts can, in fact, function. Thus it might also be expedient for workmen who get into altercations with naval guards at the Philadelphia Navy Yard to be tried by provost courts sitting in Philadelphia. It could not be contended that such courts could, upon order of the

Commanding General in the area, sentence Philadelphia Navy Yard workers to six months' imprisonment without a civil court trial.[14]

Assuming that Duncan did assault and "ill treat" the marine sentries as was charged, they could have easily subdued him (as they did) by force or they could have ejected him from the reservation. It is not claimed that Duncan, unarmed and alone, presented any problem to the armed sentries on duty and the rest of the company of marines stationed at the gate. In the first place they could have escorted him outside the reservation either peaceably or by force. The degree of force required to accomplish this would depend upon the resistance encountered. The marines would have been fully justified in using any degree of force even to the extent of killing to compel obedience to their orders. Had they killed him in preserving order or preventing interference with their duties these facts would have constituted a full defense upon their trial in a court martial for homicide.

If Duncan's conduct did not require this degree of force the marines could have reported the incident to

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[14]Cf. *Hirabayashi v. U. S.*, 320 U. S. 81, 93. This Court pointed out that appellant had been tried and convicted in the civil courts and had been subjected to penalties prescribed by Congress for the acts committed in a prescribed military area. Murphy, J.: "We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed for instance that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the laws of war (see *Ex parte Quirin*, 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury in the absence of a valid declaration of martial law." (p. 110.)

the commandant of the Navy Yard who as an administrative matter could have ordered his discharge from employment and exclusion from the naval reservation. Moreover if the commandant thought the matter serious he could have requested a prosecution either in the federal or territorial courts. Upon conviction he would have been sentenced under the federal statute anything up to ten years depending upon the circumstances of the case.[13] With the Courts of the territory operating every day trying all manner of civil and criminal cases, including the trial of defendants charged with murder on naval reservations and with the total absence of any civil strife or disruptions in any process of government, it is unrealistic to contend that any military necessity dictated the trial of Duncan before a military tribunal.

The contrast between the treatment accorded civilians in England and in Hawaii deserves attention. Under the framework of our Government, the judiciary is vested with the power of finally determining whether the necessity that confronted the Commanding General was so imperious as to justify his trying the petitioner outside the protecting shield of the Constitution. No facts have been adduced bearing on the "state of civilization of the Territory" which shows that the trial judge was in error. There existed in Hawaii no physical forces interfering with the operation of the courts which were not also present to a greater degree in many sections of the country as well as in the P[illegible]n Isles.

[13]Revised L. Hawaii 1935, Ch. 166; U.S.C. Title 18, Sec. 455.

No single instance has come to the attention of counsel in which the military has superseded or attempted to supersede the functions of the civil courts in England.[158] When consideration is given, first, to the comparable dangers which confronted England and Hawaii, second, to the degree of mobilization of manpower required in each place for the prosecution of the war, third, to the fact that in England jury trials and the orderly processes of the Courts continued without interruption, it is difficult to conclude that a case has been made out here for the overturning of constitutional principles.

The principles contended for by the Government would permit the entire country to be placed under a form of modified military government because of time and space factors involved in modern global warfare as distinguished from prior warfare. In England, where many aliens resided, detention of persons connected or suspected of being connected with sabotage or treason has been permitted without civil trial. The necessity for the exercise of this power does not form a basis for martial-law trial of civilians on charges not connected with or related to dangers involving the existence of the state.

[158]Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

II.

SECTION 67 OF THE HAWAIIAN ORGANIC ACT DOES NOT DEPRIVE CIVILIANS OF THE TERRITORY OF HAWAII OF THEIR CONSTITUTIONAL RIGHTS NOR AUTHORIZE AN EXTENSION OF THE JURISDICTION OF MILITARY TRIBUNALS NOT JUSTIFIED BY THE LAW OF WAR.

The Government contends that Section 67 of the Hawaiian Organic Act and executive actions taken thereunder enlarge the lawful scope of martial law in the Territory beyond that which would be applicable in a state of the United States. The adoption of this view is urged in part because of the presence of a large population of Japanese ancestry in the Territory, and in part because of the geographic location and strategic importance of the Islands. Before this radical departure from the traditional treatment of Hawaii is adopted, with resulting grave consequences for the Territory and for all of its citizens, careful consideration should be given (1) to the constitutional history of Hawaii prior to annexation; (2) to the judicial determination of Hawaii's right to equal treatment with the states; (3) to an analysis of Section 67 in the light of principles of constitutional law applicable in Hawaii.

(1) The history of Hawaii (including the constitutional provisions later embodied in Section 67 of the Hawaiian Organic Act) discloses that military trials of civilians after a declaration of martial law were limited to cases of persons aiding rebellion or invasion.

Hawaii has had a continuous history of a government of laws under a written constitution for over one hundred years.[16] It has had an efficient legal and

[16] Kuykendall, *Constitutions of the Hawaiian Kingdom* (1940); Papers of the Hawaiian Historical Society No. 21.

judicial system based upon the common law of England equally long. As Senator Cullom said in 1900 when the act to organize a government for Hawaii was being debated in the Senate, "it is an old country and old government".[17]

The first constitution[18] of 1840 was a simple document based upon the Declaration of Rights of 1839. It reflected the religious influence of the early missionaries.

The Constitution of 1852 contained the first mention of the privilege of the writ of habeas corpus, and provided that it should not be suspended unless "when, in cases of rebellion or invasion, the public safety shall require its suspension"[19] and in such cases the King, with the approval of his cabinet and Privy Council, could place the Kingdom under martial law.[20] The right of trial by jury was preserved "inviolate forever".[21] The Constitutions of 1864 and 1887 made no fundamental changes in regard to habeas corpus, martial law and trial by jury.

On January 17, 1893 the Provisional Government was proclaimed which functioned until the adoption of the Constitution of the Republic on July 3, 1894.[22] In this Constitution the words "imminent danger" were imported into Article 31 (the predecessor of Section 67 of the Organic Act) dealing with the suspen-

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[17]33 Congressional Record (1900) 56th Cong. 1st Sess, p. 1919.

[18]The provisions of the prior constitutions are contained in Thurston, *The Fundamental Law of Hawaii* (1904).

[19]Art. 5, Constitution of 1852.

[20]Art. 39 Id.

[21]Art. 6 Id.

[22]See Thurston, *The Fundamental Law of Hawaii* (1904) 194, 201.

sion of the privilege of the writ and martial law.[23] The Constitution of the Republic also changed the guarantee of trial by jury by the importation of a new term to guarantee a trial by "a tribunal having jurisdiction of the case".[24]

In 1895, after the adoption of the Constitution of the Republic, a conspiracy was formed to overthrow the new government. President Dole proclaimed martial law and suspended with the privilege of the writ. The legislative branch of the government immediately enacted legislation for the trial of those engaged in the insurrection to implement the constitutional provision of Article 31. The significant thing is that the 191 persons who were tried during the existence of martial law were, without exception persons engaged in the insurrection. It was never contemplated that those guilty of ordinary crimes were to be dealt with other than by the course of the common law and the statutes of the Republic. In fact the civil courts conducted their ordinary functions which was contemplated by the proclamation of President Dole, which provided that "the Courts will continue in session and conduct ordinary business as usual".[25]

The case of *In re Kalanianaole*[26] held that the privilege of the writ had been suspended, and that the military commission was a proper tribunal to try the petitioner, who had engaged in the conspiracy to overthrow the government.

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[23]Constitution of 1894, Art. 5 and Art. 31.
[24]Id. Art. 6, Section 1.
[25]Appendix.
[26]10 Hawaii 29 (1895).

The language of Article 5 and Article 31 relating to the writ of habeas corpus and martial law read in connection with the changing of the guarantee of trial by jury to the trial before a "tribunal having jurisdiction leads to the inescapable conclusion that the Constitution of the Republic was framed with an eye to a possible counter revolution in which those who engaged in the rebellion would be dealt with before a military tribunal. The fathers of the Constitution of 1894 saw to it that the new Constitution would not leave a jury trial as an avenue of escape for an insurrectionist as had happened in the abortive Wilcox rebellion in 1889.[27]

In the entire constitutional history of Hawaii the provisions relating to the suspension of the privilege of the writ (like the Federal Constitution) always has been understood to be limited to cases involving persons engaged in rebellion or invasion. Since Section 67 of the Hawaiian Organic Act is the direct descendant of Article 31 in the Constitution of the Republic, the scope of Section 67 can hardly be broader in the area of military trials of civilians than it was prior to annexation. Extending the Federal Constitution to Hawaii including the crisp language of the Bill of Rights would seem to afford less room for the view that citizens could thereafter be deprived of the right of trial by jury in cases not involving rebellion or invasion.

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[27] Wilcox plotted to overthrow the government; he was tried in the Circuit Court in Honolulu before a mixed jury who acquitted him, the incident is referred to in the *Kalanianaole Case*, 10 Hawaii 29, 62 (1895).

The annexation of Hawaii was first formally considered by the governments of Hawaii and of the United States in 1853-1854. After a long diplomatic history, in 1897, a treaty between the Republic of Hawaii and the United States was concluded to incorporate Hawaii into the United States. The treaty was never consented to by the United States Senate.

By the Newlands Resolution of July 7, 1898 (30 Stat. 750) Hawaii was annexed as part of the territory of the United States. It provided that the laws of the Hawaiian Islands, "not inconsistent with this joint resolution nor contrary to the Constitution of the United States" should remain in force until the Congress should otherwise determine.

Finally Congress adopted the Hawaiian Organic Act "to provide a government for the Territory of Hawaii". (31 Stat. 141.)

Section 5 of the Hawaiian Act provides:

> "That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States * * *"

The foregoing indicates the intent of Congress that the Constitution of the United States should be in full force and effect in Hawaii from and after the adoption of the Organic Act. That the Constitution of the United States has been extended to Hawaii in all particulars (except in certain political provisions applicable by their terms only to the states) has never been

doubted since the decision in *Hawaii v. Mankichi*, 190 U. S. 197, in which this Court unanimously agreed that after the effective date of the Hawaiian Organic Act "the Islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government" (the Court divided on the issue whether the Constitution applied before the passage of the Organic Act); and it has never since been doubted that the guaranties of the Fifth, Sixth and Seventh Amendments extend to incorporated territories which are a part of the United States. (*Hawaii v. Mankichi*, supra, at p. 220; *Rasmussen v. U. S.*, 197 U. S. 516; *Farrington v. Tokushige*, 273 U. S. 284, 299.)

(2) Trial of a civilian by a military tribunal for an offense other than against the law of war is not justified by Section 67 of the Hawaiian Organic Act.

Section 67 of the Hawaiian Organic Act provides:

> "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and * * * may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

Counsel understands that the Government takes the position that because Congress has authorized the declaration of martial law and the suspension of the privilege of the writ of habeas corpus in cases of im-

minent danger of invasion, Congress thereby, as a part of the martial law, authorized the creation of the martial-law tribunal that tried the petitioner in the case at bar. The language of the statute does not disclose any such congressional intention. Martial law is not defined in the Hawaiian Organic Act nor is there any other indication in the Act that the common law scope thereof was intended to be enlarged beyond that normally applicable in the states of the Union—that is, to include measures other than those dictated by necessity.

The inclusion of the words "or imminent danger thereof, when the public safety requires it" in the Hawaiian Organic Act indicates the desire on the part of Congress to intrust to the executive arm in the Territory the right to suspend the privilege of the writ when invasion or insurrection was threatened. Nothing in the Act indicates that Congress contemplated that a new form of military government could be instituted on domestic soil when and if the United States became involved in a war in which the island bases would be of great strategic importance.[28]

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[28]Cf. Statement of Haney, J., in *Ex parte Zimmerman*, 132 F. (2d) 442 at 452 (C.C.A. 9th): "It could be, but is not, argued that when Congress incorporated the Territory of Hawaii, it did so subject to the limitations expressed in the Organic Act, 48 U.S.C.A. Sec. 532, that the governor of such territory might 'suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law' and that such limitations expressly authorized a military government pursuant to the quoted (Art. IV, Sec. 3, cl. 2) Constitutional power. However, since no argument is made upon that precise point, and since it is assumed that a citizen's rights in the Territory of Hawaii are the same as those of a citizen in the United States I have considered the case on that basis." From what is shown herein it is submitted that any such argument as is envisioned by the judge would be wholly without constitutional foundation.

It is not necessary for this Court to determine the extent to which, in the event of threatened invasion or insurrection, a military court would be justified in exercising power with respect to persons committing offenses related to such threatened invasion or insurrection. The case at bar presents no such problem. The language of the majority in the *Milligan* case must be reviewed in the light of the circumstances that confronted the Court. When the Court said that "Martial law cannot arise from a threatened invasion. The necessity must be actual and present * * *" the Court was using general descriptive language to express its conclusion that the necessity giving rise to the trial of civilians by a military tribunal for offenses other than against the laws of war must be an overwhelming necessity. The words "threatened" and "imminent" lend themselves to division in various degrees. The phrase "when the public safety requires it", coupled with the words "imminent danger thereof", in Section 67 of the Hawaiian Organic Act, presuppose that the particular exercise of power will, in fact, be related to the public safety, hence under the language of the Hawaiian Organic Act, before the petitioner could be tried before a military tribunal, it is necessary for this Court to determine (1) that the public safety requires such trial; (2) that such trial is related to imminent invasion or insurrection.

Viewed in the foregoing light, Section 67 of the Hawaiian Organic Act, with the inclusion of the words "or imminent danger thereof", is not inconsistent with the provision in Article I, Section 9 of the Con-

stitution of the United States to the effect that the privilege of the writ shall not be suspended unless when in cases of rebellion or invasion the public safety may require it. On the other hand if Section 67 should be interpreted as permitting the suspension of the writ even in cases when not required by the public safety because of actual invasion or insurrection or the imminence thereof then the authority created by Section 67 goes beyond the scope of the authority permitted by the Constitution.

Even if it should be held that Section 67 does enlarge the occasions or periods when martial law may be declared or the privilege of the writ suspended, such a holding would not support the jurisdiction claimed by the Government for the military tribunal in the case at bar. It is virtually axiomatic that the suspension of the privilege of the writ does not authorize the executive arm of the Government to prescribe new crimes or offenses or to create "courts" or "tribunals" to try offenses. If the petitioner were within the class of persons as to whom the privilege of the writ had been and could be constitutionally suspended the result would merely be that during the suspension on a proper showing the petitioner could be held in military custody because his detention was dictated by military necessity.[29]

> "Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce

[29]Cf. *Ex parte Zimmerman*, 132 F. (2d) 442 (C.C.A. 9th).

> the person arrested in answer to a writ of habeas corpus. *The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law.* If it had intended this result, it was easy by the use of direct words to have accomplished it." (*Ex parte Milligan*, 4 Wall. 1, 18.)

Similarly, assuming that the Hawaiian Organic Act does enlarge the time within which martial law may be declared or the privilege of the writ suspended, nevertheless the Hawaiian Organic Act, like the Constitution does "not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law." "If it had intended this result, it was easy by the use of direct words to have accomplished it."

The Government disavows any intention of contending that Congress intended that the privilege of the writ of habeas corpus might be suspended in the Territory beyond the scope of the constitutional provision. Nevertheless the Government, in the Court below, referred to King, *Legality of Martial Law in Hawaii* (1942), 30 Calif. L. Rev. 599, as "impressive authority" in support of the contention that Congress so intended. The article referred to fails to consider the status of Hawaii as incorporated territory and attributes meaning to *In re Kalanianaole*, 10 Haw. 29, which is not justified by the constitutional and statutory framework on which the Supreme Court of the Republic of Hawaii decided that case.

It is true that Article 31 of the Constitution of the Republic of Hawaii was similar in language to Section 67 of the Hawaiian Organic Act. It is also true that in *In re Kalanianaole*, supra, the Supreme Court of the Republic of Hawaii held that the trial by a military commission of a person charged with misprision of treason for having participated in a rebellion, does not deprive such person of his constitutional rights under the Constitution of the Republic of Hawaii. However, the holding is of no significance in the interpretation of Section 67, for several reasons: Prior to the military trial express legislation had been enacted to provide for the carrying out of sentences of the military Commission. Subsequent legislation ratified and approved the establishment of the military Commission. At the time of trial, the Constitution of the Republic of Hawaii did not guarantee trial by jury but provided merely for trial by a tribunal having jurisdiction of the case; the constitutional guaranties of the Fifth, Sixth and Seventh Amendments to the Constitution of the United States were not applicable in the Republic of Hawaii, although as above shown it has clearly been established that such guaranties are now applicable in the Territory of Hawaii.[36] By Section 5 of the Hawaiian Organic Act Congress has clearly indicated its intent that the limitations of the Constitution of the United States are to be of full force and effect in the Territory of Hawaii.

[36]Article 6, Section 1, of the Constitution of The Republic of Hawaii provided: "No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case."

III.

THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT A "TOTAL MILITARY GOVERNMENT" LAWFULLY EXISTED IN HAWAII.

Although it was not urged below the Circuit Court of Appeals approved of the erection of a "total military government" over Hawaii. The Court below held that "martial law" was synonymous with "military government". This one vital error corrupts the whole judgment of the Circuit Court of Appeals. The language of Section 67 of the Hawaiian Organic Act affords no basis for this conclusion and it is directly contrary to the opinion of Chief Justice Chase in *Ex parte Milligan*. The distinction between martial law and military government has been generally regarded as settled for more than seventy-five years of judicial decision, text writers and official War Department texts.[31]

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[31] *Ex parte Milligan*, 4 Wall. 2, 132;
A Manual for Courts-Martial, U. S. Army (1928) p. 1;
Rules of Land Warfare, F.M. 27-10, 281, 283;
Birkheimer, *Military Government and Martial Law* (1892) (3rd Ed.) 1;
Lieber, *The Justification of Martial Law* (1898) 3;
2 Winthrop's *Military Law and Precedents* (1896) (2d Ed.) 1245;
Wiener, *A Practical Manual of Martial Law* (1940) 7;
8 *Ops. A. G.* 365;
3 Willoughby, *The Constitutional Law of the United States* (1929) (2d Ed.) 1592;
Cramer, 29 *A.B.A.J.* (1943) 368.

IV.

THE WRIT OF HABEAS CORPUS WAS AVAILABLE TO THE PETITIONER IN THIS CASE.

The Government concedes that if petitioner's military trial is invalid he is entitled to his release because of the formal termination of martial law on October 24, 1944, by proclamation. (Memorandum for United States, p. 17.) Our position is that regardless of the formal demise of martial law and the concession by the Government, petitioner would nevertheless be entitled to his release on habeas corpus. The argument in support of this view will be briefly summarized:

The case below was heard by the Court of Appeals *en banc*.[32] The opinion of the Court by Judge Healy concurred in by Judge Garrecht assumed that the writ of habeas corpus was available to petitioner and concluded that the military trial was valid. Judge Wilbur, with whom Judge Mathews concurred, concluded that the validity of the military trial was "a matter of great doubt" and accordingly stated as an additional ground for the reversal of the trial court, the view that the privilege of the writ was suspended as to this case. Judge Denman was of the view that the petition as a matter of pleading was insufficient.

It is submitted that the opinion of the Court assuming the writ available to petitioner is correct and that the concurring opinion of Judges Wilbur and Mathews holding the writ not available to petitioner

[32]Except for Circuit Judge Healy who was not present at argument but who by stipulation of counsel was a member of the Court to whom the case was submitted.

is in error. The latter view confuses the power to arrest and detain persons suspected of being hostile to the government with the power to try and punish loyal citizens for violations of ordinary municipal law. Neither Article I, Section 9 of the Federal Constitution nor Section 67 of the Hawaiian Organic Act contemplate any general suspension of the privilege of the writ of habeas corpus in all cases. The purpose of Article I, Section 9 of the Federal Constitution and the purpose of Section 67 of the Hawaiian Organic Act was to permit the detention of persons who might be hostile to the government. These provisions were never intended to prevent a judicial review or the release of a citizen tried before a military tribunal for an offense of the class constitutionally triable only by jury.[33]

CONCLUSION.

This cause involves the fundamental question whether in time of war after a declaration of martial law with the Courts open and in the complete exercise of their statuory powers the right of trial by jury is

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[33]On the limited nature of the suspension of the privilege of the writ see: Hurd, *A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus* (2d Ed. 1876) 116 et seq.; II Farrand, *Records of the Federal Constitutional Convention* (1911) 438; III Farrand, Op. Cit. 149; Binney, *The Privilege of the Writ of Habeas Corpus Under the Constitution* (2d Ed. 1862) Third Part 37; Civil War suspensions of the privilege were confined to persons charged with "treasonable practices" President Lincoln's letter to Erastus Corning, July 12, 1862, Stern, *Life and Writings of Abraham Lincoln* (Mod. Lib. Ed.) 760, 6 Richardson, *Message and Papers of the Presidents* (1897) 17, 19, 25; and the limited nature of the suspension was judicially determined in *People v. Gaul*, 44 Barb. (1865) 98.

to be scrapped and military trials substituted in that class of cases which traditionally and constitutionally are triable only by jury. The decree below in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land. It is not only without precedent in our judicial history but embodies a principle contrary to the very genius of our form of government.

The advent of the atomic age make it all the more important that this Court steadfastly adhere to its traditional role as the guardian of our civil liberties under a reign of law. While it is true that the Courts alone cannot preserve our liberties it is nevertheless the duty of the Courts "in time of war as well as in time of peace to preserve unimpaired the constitutional safeguards of civil liberty".[34] This Court should lay down no rule in these cases that will serve as an excuse in any future emergency for the seizure of civil government by the military authorities. The decree below should be reversed and the judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
October 19, 1945.

Respectfully submitted,
J. GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

[34] *Ex parte Quirin* (1942), 317 U. S. 1, 19.

(Appendix Follows.)

Appendix

CONSTITUTION OF THE UNITED STATES.

Art. I, Sec. 9, Cl. 2:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."

Art. IV, Sec. 3, Cl. 2:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

AMENDMENTS.

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;"

Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

HAWAIIAN ORGANIC ACT.

Constitution and laws of United States in effect. The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. (Apr. 30, 1900, ch. 339, Sec. 5(a), 31 Stat. 141; 48 U.S.C. 495.)

* * * * * * *

Governor to execute laws. The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress

lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known. (Apr. 30, 1900, ch. 339, Sec. 67, 31 Stat. 153, 48 U.S.C. 532.)

PROCLAMATION OF EXISTENCE OF DEFENSE PERIOD.

Under and by virtue of the powers vested in me by Act 24 of the Special Session Laws of Hawaii, 1941, and particularly section 5 thereof, and under and by virtue of all other powers in me vested by law, I, J. B. POINDEXTER, Governor of the Territory of Hawaii, do hereby find that a state of affairs exists arising out of an attack upon the Territory of Hawaii and that all of the circumstances make it advisable to protect the Territory and its inhabitants as provided in and by said Act 24 of the Special Session Laws of Hawaii 1941, and all other laws relating thereto; and by reason of the foregoing,

I do declare and proclaim a defense period to exist throughout the Territory of Hawaii.

This proclamation shall take effect upon promulgation thereof by official announcement by me by means of radio broadcast which I do further declare

to have taken place at 11:30 o'clock A. M. on the date hereof.

DONE at Honolulu, Territory of Hawaii this 7th day of December, 1941.

JOSEPH B. POINDEXTER,
Governor of the Territory of Hawaii.

GENERAL ORDERS NO. 4.

7 December 1941

By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commissions and Provost Courts is announced for the information and guidance of all concerned:

1. Military commissions and provost courts shall have power to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authority. The jurisdiction thus given does not include the right to try commissioned or enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition.

2. Military commissions and provost courts will adjudge sentences commensurate with the offense committed. Ordinarily, the sentence will not exceed the limit of punishment prescribed for similar offenses

by the laws of the United States or the Territory of Hawaii. However, the courts are not bound by the limits of punishment prescribed in said laws and in aggravated cases and in cases of repeated offenses the courts may adjudge an appropriate sentence.

3. The record of trial in cases before military commissions will be substantially similar to that required in a special court martial. The record of trial in cases before provost courts will be substantially similar to that in the case of a Summary Court Martial.

4. The procedure in trials before military commissions and provost courts will follow, so far as it is applicable, the procedure required for Special and Summary Courts Martial respectively.

5. The records of trial in all cases will be forwarded to the Department Judge Advocate. The sentences adjudged by provost courts shall become effective immediately. The sentence adjudged by a military commission shall not become effective until it shall have been approved by the Military Governor.

6. All charges against civilian prisoners shall be preferred by the Department Provost Marshal or one of his assistants.

7. The Provost Marshal is responsible for the prompt trial of all civilian prisoners and for carrying out the sentence adjudged by the court.

8. Charges involving all major offenses shall be referred to a military commission for trial. Other

cases of lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of 5 years, and a fine of not to exceed $5000.00. MILITARY COMMISSIONS MAY ADJUDGE PUNISHMENT COMMENSURATE WITH THE OFFENSE COMMITTED AND MAY ADJUDGE THE DEATH PENALTY IN APPROPRIATE CASES.

9. In adjudging sentences, provost courts and military commissions will be guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.

THOMAS H. GREEN,
Lt. Col. J.A.G.D.
Executive Officer.

HAWAII CONSTITUTION OF 1852.

ARTICLE 5. The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when, in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. The rights of trial by jury, in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever.

ARTICLE 39. The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can place the whole Kingdom, or any part of it under martial law; and he can ever alienate

it, if indispensable to free it from the insult and oppression of any foreign power.

HAWAII CONSTITUTION OF 1864.

ARTICLE 5. The privilege of the writ of *Habeas Corpus* belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom or any part of it under martial law.

HAWAII CONSTITUTION OF 1887.

ARTICLE 5. The privilege of the writ of *Habeas Corpus* belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension.

ARTICLE 6. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case.

ARTICLE 37. The King, in case of invasion or rebellion, can place the whole Kingdom, or any part of it, under martial law.

Article 5.—Writ of Habeas Corpus

The privilege of the Writ of Habeas Corpus belongs to all men, and shall not be suspended, except by the President or by one of the Cabinet Ministers as herein provided, when in case of rebellion or invasion, or imminent danger of rebellion or invasion, the public safety shall require its suspension.

Provided, however, that no alien unlawfully entering the Republic shall be entitled to this Writ as of right.

Article 6.—Right of Trial

Section 1. No person shall be subject to punishment for any offense except on due and legal conviction thereof by a tribunal having jurisdiction of the case.

Article 31.—Martial Law

Suspension of Habeas Corpus

The President, or one of the Cabinet Ministers as herein provided, may, in case of rebellion, or invasion, or imminent danger of rebellion or invasion, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the whole or any part of the Republic under martial law.

Article 100.—Advisory Council

Until the convening of the first Legislature, in either special or regular session, the members of the

Advisory Council of the Provisional Government of the Hawaiian Islands shall constitute a council to be styled the "Advisory Council of the Republic of Hawaii".

The Advisory Council of the Republic of Hawaii and the Executive Council, sitting together, shall be vested with all the powers and authority heretofore vested in the Executive and Advisory Council of the said Provisional Government, and also all the powers and authority by this Constitution granted to the Senate or to the Legislature.

Such convening of the Legislature shall thereby terminate the existence, power and authority of the Advisory Council.

PROCLAMATION.

EXECUTIVE BUILDING.

Honolulu, H. I., Jan. 7, 1895.

The right of *Writ of Habeas Corpus* is hereby suspended and *Martial Law* is instituted and established throughout the Island of Oahu to continue until further notice, during which time, however, the Courts will continue in session and conduct ordinary business as usual, except as aforesaid.

By the President:

SANFORD B. DOLE,
President of the Republic of Hawaii.

J. A. King,
Minister of the Interior.

ACT 18.

An Act Providing for the Carrying out by the Marshal or his Deputy of Sentences of Military Commissions and Courts Martial.

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. It shall be the duty of the Marshal or his Deputy, whenever so required by the order of the Commander in Chief of the Military Forces, or by the precept or Mandate of the President, and upon and in conformity therewith, to execute and carry out the sentence of any Military Commission or Court Martial convened, or to be convened, in the manner and at the time and place designated in the order approving the findings and proceeding of and confirming or modifying the sentence imposed by such Military Commission or Court Martial.

Any jail or prison of the Republic or other place designated by the President or Commander in Chief may be used as a place of imprisonment or detention of any person convicted and sentenced to imprisonment by any such Commission or Court Martial.

Section 2. This Act shall take effect from the date of its approval.

Approved this 8th day of February, A. D. 1895.

(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) J. A. KING,
Minister of the Interior.

ACT 20.

An Act Relating to Martial Law, Trials by Military Commission and the Liability of Officers of the Government and Others for Acts Done in Suppressing Rebellion.

Whereas, Being seduced by the insidious counsel of wickedly designing persons, many individuals resident in the Island of Oahu did conspire by force to overthrow the Constitution and Government here established by law, and in furtherance of such, their purpose did with force and in confederated multitude on the 6th day of January, 1895, and on divers other days then following, in the District of Honolulu, Island of Oahu, levy war against this Republic, and did commit murder and other felonies, and did provide themselves with arms, ammunition and dynamite with treasonous purpose, and with intent to terrorize the inhabitants of the city of Honolulu, and for a time to overturn and destroy all government; and * * *

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. All proclamations and orders published or made and all acts, matters and things commanded, directed or done, or to be commanded, directed or done by the President, or by any officer of the Government, or other person acting under the authority of the President, for the purposes and during the time herein declared, that is to say, on, from and since January 6, 1895, until martial law shall be declared

to be no longer in force, whether done in a district in which martial law was proclaimed or was in force, or done in a district in which martial law was not in force, in the proclamation or furtherance of martial law, or in the suppression of insurrection, or in the establishment of a military tribunal, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason, misprision of treason, conspiracy to incite or commit treason, or with any disloyal or seditious practice or with any act or conspiracy dangerous to the peace or to the safety of life or property or in the arrest and detention of persons held for investigation, are hereby declared to have been done within the constitutional authority of the President and are confirmed.

Section 2. This Act shall take effect from and after the date of its publication.

Approved this 15th day of March, A. D. 1895.
(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) FRANCIS M. HATCH,
Minister of Foreign Affairs.

ACT 24.

An Act to Prevent the Bringing of Actions Against Officers of the Government or Others for Acts done in Suppressing Rebellion.

Be it enacted by the Executive and Advisory Councils of the Republic of Hawaii:

Section 1. No prosecution, indictment, action or suit shall be maintained in any court, criminal or civil, against any officer of the Government or other person acting *bona fide* under the authority of the President or in good faith for the purpose of suppressing rebellion, for any acts, matters and things done or omitted to be done, or which shall be done, on, from and since January 6, 1895, until martial law shall be declared to be no longer in force, whether done in a district in which martial law was proclaimed or in force, or done in a district in which martial law was not in force, in the suppression of rebellion or in furtherance of the object of martial law, or in the arrest, imprisonment, deportation, trial, conviction or sentence of any person charged with treason, misprision of treason, conspiracy to incite or commit treason or with any disloyal or seditious practice or act or with any act or conspiracy dangerous to the peace or the safety of life or property, or in the arrest and detention of persons held for investigation.

Section 2. In order to prevent any doubt which might arise whether any act alleged to have been done, as aforesaid under the order or authority of the President or to have been done *bona fide* in order to suppress insurrection was so done, it shall be lawful for the President or his successor to declare such acts to have been done under such order or authority or *bona fide* for the purpose aforesaid; and such declaration by any writing under the hand of the President or his successor shall in all cases be conclusive

evidence that such acts were so done respectively; and such order or declaration may be shown under the general issue or pleaded in bar; and if so pleaded such plea shall suffice, although it may set out merely the general effect of such order or declaration or the fact only that such order or approval was given prior to the matter complained of or has been since received.

Section 3. This Act shall take effect from and after the date of its publication.

Approved this 15th day of March, A.D. 1895.

(Signed) SANFORD B. DOLE,
President of the Republic of Hawaii.

(Signed) FRANCIS M. HATCH,
Minister of Foreign Affairs.